

Exhibit Y

Hartford Casualty Insurance Company vs. Fireman's Fund Insurance Company, et al.
Donald Way on 09/16/2016

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION
4 ---oo---

5 HARTFORD CASUALTY INSURANCE COMPANY,
6 an Indiana Corporation,

7 Plaintiff,

8 vs. No. 3:15CV-02592SI

9 FIREMAN'S FUND INSURANCE COMPANY, a
10 California Corporation' BURNS &
11 WILCOX INSURANCE SERVICES, INC., a
12 California Corporation; and DOES
13 1 to 50,

14 Defendants.

15 _____/

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19 DEPOSITION OF DONALD WAY

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Taken before NICOLE HATLER

CSR No. 13730

September 16, 2016

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3 EXAMINATION BY MR. BRUGGEMANN

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4 EXAMINATION BY MR. BATCHMAN

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5 EXAMINATION BY MR. KASTAN

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E X H I B I T S

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10 DEFENDANTS'

11 Exhibit 65 Deposition notice

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12 Exhibit 66 Deed

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13 Exhibit 67 Mr. Way's file

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DEPOSITION OF DONALD WAY

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4 BE IT REMEMBERED, that pursuant to Notice, and on
5 the 16th day of September 2016, commencing at the hour of
6 9:58 a.m., in the offices of Wolfe & Wyman LLP, 2175
7 California Street, Suite 415, Walnut Creek, CA 94596,
8 before me, NICOLE HATLER, a Certified Shorthand Reporter,
9 State of California, personally appeared DONALD WAY,
10 produced as a witness in said action, and being by me
11 first duly sworn, was thereupon examined as a witness in
12 said cause.

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---oo---

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APPEARANCES

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For the Plaintiff:

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For the Defendant Burns & Wilcox:

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1 For the Cross-Defendant Mosen O'Hadi:

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1 But could he have? Certainly.

2 Q. In the -- the custom and practice in the
3 industry that you've been testifying, would it be
4 permissible to sell him that policy if it didn't provide
5 whatever the standard level of coverage was considered to
6 be?

7 MR. KASTAN: Vague and ambiguous as to,
8 "standard level of coverage." I don't know what you mean
9 by that, Scott.

10 MR. BRUGGEMAN: Well, he's testified that you
11 have to have some level of coverage commensurate with the
12 value of the property and --

13 MR. KASTAN: So why don't you rephrase your
14 question in a way that makes sense?

15 MR. BRUGGEMAN: No. I think it does. We'll let
16 him have a shot at answering.

17 MR. KASTAN: Then I'll object as to form, and I
18 don't understand the question. It's unintelligible.

19 THE WITNESS: I did it again. Please, can I
20 have the question again?

21 BY MR. BRUGGEMAN:

22 Q. I'll restate it. What is the -- what, in your
23 opinion as an agent of 50-plus years or roughly 50
24 years --

25 A. Yeah. Don't --

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1 Q. -- would have been the appropriate coverage for
2 the Broad Beach property at the time Herndon Partners,
3 LLC, applied for the coverage we've been referring to as
4 the primary policy on the Broad Beach property?

5 A. Yeah. And that's interesting because it was
6 actually Herndon, to be technical about it, not Paul, who
7 initially applied and then they get mixed together, of
8 course. I think it's well-established that barring a
9 voluntary undertaking or a holding out or a promise to do
10 detailed appraisals or to do extra work beyond what's in
11 custom and practice expected of a retail or insurance
12 agent or broker to meet the standard of care, that
13 there's no obligation on that retail agent or broker to
14 specify an amount of coverage. I think that's
15 well-established. I think we all agree on that.

16 However, as I mentioned, there can be red flags.
17 If you have a home on the beach in Malibu which you are
18 insuring, as I recall for, I want to say a million-five,
19 something like that, say, the basic building fire
20 insurance, for example, and you also own four vehicles
21 including a Porsche and three other expensive cars --
22 none of which I own -- and you also own 10 or 20
23 additional residences and you're also a successful real
24 estate developer and to have a limit of liability
25 insurance on that beach property, which is obviously to

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1 some extent an attractive nuisance, it's a significant
2 exposure, of \$300,000 is ridiculous; and standard of care
3 does require that Mosen O'Hadi would go back to Herndon
4 or whomever and say, Look, you know, we need to make sure
5 you have more than \$300,000 of liability insurance.

6 Now, if Herndon and Paul Owhadi come back and
7 say, We just talked to our lawyers, and we just did this
8 and that and we want \$300,000 and that's all we're going
9 to pay for it, go buy it for me, okay, then Mosen's off
10 the hook. He raised the red flag, waived it up there and
11 said, Hey, guys, this doesn't make any sense, and the guy
12 comes back and says, Well, I think it does. I've done
13 all the research, considered the options, the
14 alternatives, it's what I want. If you won't sell it to
15 me, I'll go buy it from someone else. Okay.

16 Now, there might be an extreme case in which
17 then what the broker should do is say, Go buy it from
18 somebody else. A former state supreme court justice in
19 California refused to carry more than minimum limits of
20 financial responsibility on her personal automobile
21 insurance policy. Chief justice of the California
22 Supreme Court. She's driving around with a 15, 30, and
23 5. You know what I mean? And the poor State Farm agent
24 who wrote that policy would have his lawyer write this
25 three-page disclaimer to her for signature every year.

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1 And I kept saying, Why don't you just tell her to go
2 someplace else? He said, I'm not going to tell the chief
3 justice of the California Supreme Court to get out of my
4 office.

5 I mean, okay. So you can have -- obviously
6 that's a weird unique situation, and you can have such
7 situations. And if you do, then you just have to be
8 mature and professional and consider the ramifications as
9 to how you deal with it. But if there is an obvious red
10 flag, something that just doesn't make sense -- and I'm
11 not saying you want to insure the house for a
12 million-five, and you think it should be insured for two
13 million. That's not a red flag, just a difference in
14 valuation.

15 But if something is obviously crazy, then
16 whoever participates in the processing and the
17 underwriting and perhaps even the issuing of that
18 contract, that insurance contract, has a responsibility
19 to say, Wait, it doesn't make any sense. We need an
20 explanation before we can proceed.

21 Q. All right.

22 MR. KASTAN: Let's take a little break I have to
23 go use the restroom.

24 THE WITNESS: Is this a good time --

25 MR. BRUGGEMAN: Off the record.

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1 BY MR. BRUGGEMAN:

2 Q. All right. Is this still your opinion?

3 A. Yes.

4 Q. All right. And I'm -- I'm trying to restate so
5 I understand, and tell me if I'm -- I'm going in the
6 wrong direction. Is it your opinion that the excess
7 policy should have included every entity which had
8 insurable interest in any property covered by the excess
9 policy?

10 A. Yes.

11 Q. You state that there's a strong argument to be
12 made that the excess policy should have been on a
13 commercial rather than personal form. Is this an opinion
14 you still hold?

15 A. Yes. You'll notice I did not draw out a firm
16 conclusion. I just said that a strong argument can be
17 made that all would have been better served had the
18 excess been written on a commercial form.

19 Q. You -- your report discusses that it is
20 axiomatic that the insureds on an excess policy match
21 precisely the insureds on the underlying primary policies
22 to the extent of the respected insurable interests. Who
23 were the insureds on the excess policy?

24 A. I believe --

25 MR. KASTAN: I'm sorry. Calls for a legal

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1 Q. Okay. Does a broker have an obligation to go
2 over all of the exclusions within a given policy with a
3 prospective insured?

4 A. No.

5 Q. Okay. And so, when does that obligation ensue?

6 A. That is fact intensive. If the policyholder
7 asks for a line-by-line review, then you better do it.
8 Okay? Either that or go pick and find a new broker or
9 he'll go find a new broker. In some degree, it depends
10 upon the sophistication in the insurance business of --
11 of the buyer. If it's John and Mary Smith and Paul and
12 Susan Owhadi, it's one thing; if it's the risk management
13 department for General Motors Corporation, that's
14 something very different. But then -- and I think most
15 importantly, it depends upon the nature and the
16 likelihood of applicability of the exclusion.

17 So if you sell homeowner's insurance in
18 California, you'd better disclose that earthquake and
19 flood are not covered. If you sell homeowner's insurance
20 in Hawaii, you'd better disclose that volcanic eruptions
21 and hurricanes are not covered. Yes, you can buy special
22 insurance, but they're not covered in the basic policies.
23 And if you're insuring a bar and it's got a liquor
24 liability exclusion in the policy, oops. So really all
25 you've got is premises liability. You'd better disclose

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1 that. So if it's -- if it's relevant, you've got an
2 aviation exclusion, typically -- well, if you happen to
3 know the guy owns an airplane, you've got to talk about
4 that. But going through each and every exclusion, no.
5 You could be there all day. But exclusions that may be
6 relevant.

7 For instance, a rental properties exclusion for
8 somebody who owns 20 houses, you -- yeah, you've got to
9 talk about that.

10 Q. Is there any scholarly article or treatise that
11 you're aware of that says, Broker, this is when you have
12 that obligation to go over the exclusions, and this is
13 when you don't?

14 A. I haven't looked for any. I can't tell you
15 there aren't. Maybe Bob Anderson's book, maybe in some
16 of the publications from IRMI, I-R-M-I, International
17 Risk, International Institute of Dallas, Texas, or some
18 of the other books I have sitting on my bookshelves --
19 Couch or some of the others. I don't know. It's just so
20 generally accepted from my 50 years of experience and
21 custom and practice, I didn't feel it was necessary to go
22 pull published citations.

23 One problem with those, of course, is that no
24 two authors precisely agree. We, unfortunately perhaps,
25 do not have a definitive text on this subject that all of

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1 us experts agree upon. So I have been in cases where I
2 come up with one citation, and the expert on the other
3 side comes up with a different citation and somebody else
4 comes up with a third citation. They're all from highly
5 reputable professional sources, and they all disagree.
6 That doesn't really help anybody. So I prefer just going
7 from the basic custom and practice that is actually my
8 expertise.

9 Obviously, I did it for 50 years, and I've been
10 challenged on it to explain why it's the custom and
11 practice. Does it make common sense to a judge or jury
12 as to why this is, in fact, the custom and practice and
13 why not doing it is a violation of the standard of care.

14 Q. All right.

15 A. Long answer to a short question. Sorry.

16 Q. That's okay.

17 MR. BATCHMAN: I don't think I have any further
18 questions.

19 THE WITNESS: Okay.

20 MR. KASTAN: I have a couple just quick
21 clarification questions, Don.

22 THE WITNESS: When attorneys say, I have just a
23 couple --

24 MR. KASTAN: I really do. Trust me. I don't
25 have the energy to ask you any more than a couple.

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REPORTER'S CERTIFICATE

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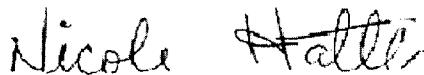
3

4 I, NICOLE HATLER, a Shorthand Reporter, State of
5 California, do hereby certify:

6 That DONALD WAY, in the foregoing deposition
7 named, was present and by me sworn as a witness in the
8 above-entitled action at the time and place therein
9 specified;

10 That said deposition was taken before me at said
11 time and place, and was taken down in shorthand by me, a
12 Certified Shorthand Reporter of the State of California,
13 and was thereafter transcribed into typewriting, and that
14 the foregoing transcript constitutes a full, true and
15 correct report of said deposition and of the proceedings
16 that took place;

17 IN WITNESS WHEREOF, I have hereunder subscribed
18 my hand this 21st day of September 2016.

19 
Nicole Hatler

20 NICOLE HATLER, CSR NO. 13730
21 State of California

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